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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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)  
) DEFENSE MOTION TO  
) DISMISS UNDER  
) ART 10, UCMJ  
)  
) 1 October 2004

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1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission dismiss the charge against Mr. Hamdan because the United States Government did not comply with its own rules regarding speedy trial.

3. Overview. The Supreme Court of the United States has warned that the "guarantee of a speedy trial 'is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" *United States v. Loud Hawk*, 106 S. Ct. 648, 654 (1986). American military law, and in particular the Uniform Code of Military Justice (UCMJ), is even more stringent than its civilian counterpart in guaranteeing rights of speedy charge and trial.

Unfortunately, the government has held Mr. Hamdan in custody for almost three years without bringing his case to trial before a military commission or informing him of the reasons for delay. These actions violate Mr. Hamdan's right to a speedy trial under the Uniform Code of Military Justice. A proceeding like this would never pass muster in the American military justice system. The fact that these proceedings are occurring at Guantanamo, a place that the Congress of the United States has labeled subject to the Uniform Code of Military Justice, requires this Commission to dismiss the charges.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President determined were subject to the order.

b. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.

c. On or about July 2002, Mr. Hamdan was transferred from Afghanistan to Guantanamo Bay where he was initially held in Camp Delta.

d. Camp Delta consists of cell block units holding XXXX detainees in individual cells, is open to the air, and permits conversations between detainees.

e. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

f. On or about 14 December 2003, Mr. Hamdan was transferred on order of Commander, JTF Guantanamo to Camp Echo into pre-trial segregation, pursuant to preparation for trial by Military Commission.

g. On 15 December 2003, The Chief Prosecutor for Military Commissions requested that the Chief Defense Counsel detail counsel to Mr. Hamdan for the limited purpose of negotiating a pre-trial agreement.

h. On 18 December 2003, the Chief Defense Counsel detailed LCDR Charles D. Swift, JAGC, USN, as Mr. Hamdan's military Defense Counsel.

i. On 31 January 2004, Detailed Defense Counsel met with Mr. Hamdan and explained his rights in conjunction with Military Commission and the governments stipulation that detailed defense counsel's access was conditioned on Mr. Hamdan's willingness to enter into pre-trial negotiations.

j. On 12 February 2004, Detailed Defense Counsel on behalf of Mr. Hamdan submitted a demand for charges and for a speedy trial.

k. On 23 February 2004, the Legal Advisor to the Appointing Authority denied the applicability of Article 10 of the UCMJ, without further explanation or charges.

l. Following Defense demand for speedy trial, CDR XXXX, JAGC, USN, Detailed Prosecutor in the subject case, orally stated to Detailed Defense Counsel that Mr. Hamdan's case was going to be "moved to the back of the stack."

m. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

- n. The first session of Mr. Hamdan's Military Commission was held on 24 August 2004.

5. Law.

a. The UCMJ Applies to Mr. Hamdan.

1. The Uniform Code of Military Justice took effect on May 31, 1951, nearly one year after the Supreme Court's *Eisentrager* decision of June 1950. See 10 U.S.C. 801-940 (1952 ed. Supp. V). The Code is the result of painstaking study and reflects an effort to reform the system from top to bottom. *Burns v. Wilson*, 346 U.S. 137, 141 (1953) (plurality op.). With this complete revision of the Articles of War came the expansion of Article 2, in 10 U.S.C. 802(12), which identifies additional persons who are subject to the Code:

Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

2. The expansion of the UCMJ in the above quoted paragraph 12 thus represents a clear break from the World War II military commission cases like *Yamashita*, where the Court held that the Articles of War did not apply to General Yamashita of the Japanese Imperial Army. *Yamashita*, 327 U.S. at 20. Unlike the old Article 2, which only covered "members of our own Army and of the personnel accompanying the Army," (*id.*) the new ¶12 extends jurisdiction to "persons within" leased areas without limitation.

3. As proposed and ultimately adopted, ¶12 was understood to be much more expansive than its predecessor, 34 U.S.C. § 1201. In fact, our own military officers warned that this paragraph 12 expansion of the UCMJ would create major international difficulties. For example, in his Senate testimony, Maj. Gen. Thomas Green, the Army Judge Advocate General, argued "Article 2 (12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment of a statute conferring such sweeping jurisdiction over foreign nationals whose only connection with the armed forces might be that they are native or residents of an area leased to the United States, will inevitably lead to international complications." Statement of Major General Thomas H. Green, U.S. Senate, Cmte. on Armed Services, May 9, 1949, at 266.

4. The Government now finds itself in the very situation that General Green contemplated when the UCMJ was drafted. Under ¶12, Mr. Hamdan is subject to the UCMJ, for the Naval Base is leased by the United States and under the control of Secretary Rumsfeld. Therefore, Mr. Hamdan is entitled to the protections provided by the UCMJ, including potential review by civilian courts (*See Schlesinger v. Councilman, supra; Brosious v. Warden*, 125 F. Supp. 2d 681 (M.D. Pa. 2000) (reviewing, on habeas, various challenges made under the UCMJ

to a military conviction)) and the right to a speedy trial pursuant to 10 U.S.C. § 810, discussed below.

5. It is undoubtedly clear that the UCMJ applies to Mr. Hamdan for one other reason. Indeed, President Bush, when promulgating the Military Order that established the commissions, expressly relied on the UCMJ as support for his authority to do so. See Military Order Para. 1 (relying on the authority of "Sections 821 and 836 of title 10, United States Code"). If the UCMJ did not apply to Mr. Hamdan, therefore, additional constitutional problems about the authority of the Executive to promulgate the Order would arise.

b. Mr. Hamdan's Detention Violates the UCMJ.

1. Article 10 of the UCMJ provides that when the government places a defendant "in arrest or confinement prior to trial," the government must take "immediate steps" to "try him or to dismiss the charges and release him." 10 U.S.C. § 810. This statute "imposes a more stringent speedy-trial standard than that of the Sixth Amendment." *United States v. Kossman*, 38 M.J. 258, 259 (CMA 1993). The government violates Article 10 when it "could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to." *Id.* At 261. Thus, in assessing whether a military defendant's speedy trial rights have been violated, the court will apply a standard of "reasonable diligence." *United States v. Tibbs*, 35 C.M.R. 322, 325 (CMA 1965); see *Kossman*, 38 M.J. at 262 (reaffirming *Tibbs* standard).

2. In assessing "reasonable diligence," the military courts look to the four factors outlined by the Supreme Court in the Speedy Trial Clause case of *Barker v. Wingo*, 407 U.S. 514 (1972) as "good guidance." *Kossman*, 38 M.J. at 261 n.3; *United States v. Birge*, 52 M.J. 209, 212 (CAAF 1999) ("It is appropriate . . . to consider the *Barker v. Wingo* factors . . . in determining whether a particular set of circumstances violates a service member's speedy trial rights under Article 10."). The *Barker* factors are "length of delay," "the reason for the delay," "the defendant's assertion of his right," and "prejudice to the defendant."

3. In light of the *Barker* factors, the Government's actions in this case constitute an egregious violation of Article 10. Petitioner has been confined without trial far, far longer than any reported case assessing a speedy trial claim in the court-martial context. *Cf. United States v. Hatfield*, 44 M.J. 22, 23 (CAAF 1996) (observing that "3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers, and "[f]our months is even longer" in the course of affirming a speedy trial dismissal based on 106 days of confinement). As for reason for delay, the government simply did not need over two years to gather evidence against petitioner. The government has not been "reasonabl[y] diligen[t]" in taking "immediate steps to try" petitioner. *Kossman*, 38 M.J. at 262. Article 10 was intended to prohibit precisely this kind of "foot-dragging" in the military justice system. *Id.* Therefore, petitioner is entitled to speedy trial relief under the UCMJ.

4. The unreasonable and lengthy delay, moreover, has obviously prejudiced petitioner's defense, which will be based on eyewitness and other testimony that grows more stale with each passing day. See *United States v. Beamon*, 992 F.2d 1009, 1014 (interpreting the

*Barker* prejudice factors to include "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired"). Furthermore, the solitary confinement in which Mr. Hamdan is being held certainly qualifies as "oppressive pretrial incarceration" and creates a genuine risk of psychological injury, which will impair Mr. Hamdan's ability to assist in his own defense. (See Declaration of Dr. XXXX.) Without prompt relief by this Court, the continued solitary confinement of Mr. Hamdan may eviscerate his ability to put on a vibrant defense before a military commission and be in tension with fundamental rights of the accused.

c. Dismissal is the Appropriate Remedy.

1. The remedy for a violation of speedy trial rights is dismissal of the charges. See *Strunk v. United States*, 412 U.S. 434 (1973) (dismissal is only proper remedy for Speedy Trial Clause violation); *United States v. Hatfield*, 44 M.J. 22 (CAAF 1996) (dismissing charges for UCMJ Article 10 violation).

2. This Commission should dismiss the charges, recognizing that this long period of delay is fundamentally inexcusable. That is what any American military court would do, and what this Commission is obligated to do.

6. Files Attached.

a. Declaration of Dr. XXXX

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission Members that he will provide the Commission Members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument

8. List of Legal Authority Cited.

a. *United States v. Loud Hawk*, 106 S. Ct. 648 (1986)

b. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

c. Uniform Code of Military Justice, 10 U.S.C. 801-940 (1952 ed. Supp. V)

d. *Burns v. Wilson*, 346 U.S. 137 (1953)

e. *In re Yamashita*, 327 U.S. 1 (1946)

f. 34 U.S.C. § 1201

g. Statement of Major General Thomas H. Green, U.S. Senate, Cmte. on Armed Services, May 9, 1949

- h. *Schlesinger v. Councilman*, 420 U.S. 738 (1975)
- i. *Brosious v. Warden*, 125 F. Supp. 2d 681 (M.D. Pa. 2000)
- j. 10 U.S.C. § 810
- k. *United States v. Kossman*, 38 M.J. 258 (CMA 1993)
- l. *United States v. Tibbs*, 35 C.M.R. 322 (CMA 1965)
- m. *Barker v. Wingo*, 407 U.S. 514 (1972)
- n. *United States v. Birge*, 52 M.J. 209, 212 (CAAF 1999)
- o. *Cf. United States v. Hatfield*, 44 M.J. 22 (CAAF 1996)
- p. *United States v. Beamon*, 992 F.2d 1009 (9<sup>th</sup> Cir. Or. 1993)
- q. *Strunk v. United States*, 412 U.S. 434 (1973)

9. Witnesses and/or Evidence Required. The Defense intends to call Professor XXXX (Curriculum Vitae will be forwarded) as an expert witness in the area of constitutional and statutory law, specifically discussing the speedy trial doctrine, in support of this motion. The expert testimony is probative to a reasonable person under the circumstances presented based on the Professor's skill, knowledge, training and education. He possesses specialized knowledge of the laws of the United States relating to speedy trial. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, the Professor's specialized knowledge will assist the Commission Members in understanding and determining whether the preferral and referral of the charge in this case violates the speedy trial rules.

10. Additional Information. None.

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